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No. 85-65

In the Supreme Court of the United States

OCTOBER TERM, 1985

SHANGHAI POWER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, which recovered $20 million as the result of a 1979 Executive Agreement between the United States and the People's Republic of China (PRC) that settled the claims of United States nationals against the PRC, is entitled to compensation under the Just Compensation Clause of the Fifth Amendment for an alleged taking of its property to the extent that petitioner's recovery under the settlement agreement was less than the full value of its physical assets in China that were seized by the PRC in 1950.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The opinion of the United States Claims Court (Pet. App. 5a-30a) is reported at 4 Cl. Ct. 237.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1985 (Pet. App. 1a-3a), and a petition for rehearing was denied on April 16, 1985 (*id.* at 4a). The petition for a writ of certiorari was filed on July 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND EXECUTIVE AGREEMENT INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

2. The May 11, 1979 Executive Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, 30 U.S.T. 1957 *et seq.*, is reproduced at Pet. App. 32a-35a.

STATEMENT

1. Beginning in 1929, petitioner, a Delaware corporation, owned and operated a power plant in Shanghai, China. Petitioner distributed electricity in that area pursuant to a franchise agreement with the Shanghai Municipal Council. In 1950, the People's Republic of China (PRC) expropriated all of the property in China that belonged to United States nationals, including petitioner's power plant. The PRC paid no compensation for this expropriation until 1979. Pet. App. 6a.

In 1966, Congress directed the Foreign Claims Settlement Commission to evaluate the claims of United States nationals against the PRC, "in order to obtain information concerning the total amount of such claims against * * * the Chinese Communist regime." 22 U.S.C. 1643. See 22 U.S.C. 1643-1643k, as amended by Pub. L. No. 89-780, 80 Stat. 1365. The Commission then was to certify to the Secretary of State the amount of the loss suffered on each individual claim, so that this information could be used in any future diplomatic discussions with the PRC for the resolution of the claims. 22 U.S.C. 1643f(a); see H.R. Rep. 2233, 89th Cong., 2d Sess. 2 (1966); S. Rep. 1586, 89th Cong., 2d Sess. 2, 7, 9 (1966). Congress specified that this provision for computation of the amounts owed by the PRC was not to be construed as expressing any intention by Congress to authorize an appropriation of funds for the payment of such claims. 22 U.S.C. 1643. On the basis of submissions by claimants in ex parte proceedings, the Commission determined in 1972 that the total value of the

property seized by the PRC was approximately $197 million and that the value of petitioner's property was approximately $54 million (Pet. App. 6a).

In 1979, President Carter established diplomatic relations with the PRC. See *Goldwater* v. *Carter,* 444 U.S. 996 (1979). As part of the normalization process, the United States entered into an Executive Agreement with the PRC that settled the outstanding claims of United States nationals against the PRC (Pet. App. 32a-35a; 30 U.S.T. 1957 *et seq.* Under the Agreement, the United States received a total of $80.5 million, paid over a period of six years, as an aggregate payment for all outstanding claims (Pet. App. 34a). In 1980, Congress enacted a statutory provision for the distribution of this aggregate amount. 22 U.S.C. 1627(c), as added by Pub. L. No. 96-445, § 1(2), 94 Stat. 1891 *et seq.* As this Court has observed with respect to this settlement, Congress, in providing for the distribution of the funds received from the PRC, "did not question the fact of the settlement or the power of the President to have concluded it." *Dames & Moore* v. *Regan,* 453 U.S. 654, 681 (1981). See 126 Cong. Rec. 28480-28482 (1980). Under the statutory formula, petitioner received approximately $20 million. Pet. App. 7a.

2. Petitioner filed this action seeking to recover from the United States the sum of $124 million, which represented the difference between the $20 million allocated to it under the settlement and the $144 million that the Commission found to be the total value of the property in China ($54 million) plus accrued simple interest since 1950 (Pet. App. 7a). Petitioner argued that the President settled its claim for less than its full value in order to further the broader foreign policy objectives of the United States and that this action constituted a "taking" of its property for which the Fifth

Amendment requires the payment of compensation (*ibid.*). The Claims Court granted summary judgment in favor of the United States (Pet. App. 4a-30a).

a. The Claims Court first concluded that petitioner's claim against the PRC under international law for the expropriation of its holdings in China constituted "property" within the meaning of the Just Compensation Clause of the Fifth Amendment (Pet. App. 7a-11a). However, the court rejected petitioner's contention that the value of that property was the amount determined by the Foreign Claims Settlement Commission, because the Commission had calculated that amount in an ex parte proceeding and the Commission "was valuing an entirely different asset than that allegedly taken here" (*id.* at 11a-12a). The court observed that the Commission had determined the value of petitioner's physicial plant in China, which petitioner no longer owned when the President entered into the Executive Agreement with the PRC in 1979. At that time, petitioner's asset was only a claim against the PRC for compensation, the value of which would depend upon such factors as the likelihood of finding a forum for presenting the claim, overcoming all relevant defenses, obtaining satisfaction out of the PRC's available assets, and the cost of prosecuting the claim (*id.* at 12a). The court assumed for present purposes that the value of petitioner's claim against the PRC was more than it would receive under the settlement (*ibid.*), but the court nevertheless held that there had not been a "taking" of that claim by the United States (*id.* at 12a-30a).

b. The Claims Court recognized that under this Court's decisions, the question whether a "taking" has occurred turns on whether " 'justice and fairness' " require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated in a few persons. Pet. App. 12a-13a, quoting *Penn Central Transportation Co.* v. *New York City*, 438

U.S. 104, 124 (1978), and *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960). The court observed that in making this determination, it must consider such factors as "the degree to which the property owner's rights were impaired, the extent to which the property owner is an incidental beneficiary of the governmental action, the importance of the public interest to be served, whether the exercise of governmental power can be characterized as novel and unexpected or falling within traditional boundaries, and whether the action substituted any rights or remedies for those it destroyed." Pet. App. 14a-15a (footnotes omitted). Applying these principles, the Claims Court held that justice and fairness did not require a finding that the United States is liable for a "taking" of property in the circumstances presented.

The Claims Court first explained that the occasion for diplomatic espousal and settlement of a national's claim by his government arises where the national encounters difficulty collecting from the foreign government—an event that may have implications extending far beyond the particular debt or the parties seeking to recover on it and that is frequently symptomatic of more serious problems between the two countries (Pet. App. 15a-17a). In addition, the court noted that the claims themselves are often sources of friction between the two nations and that the power to alleviate this friction and reestablish amicable relations through the settlement of claims is "consistent with 'established international practice reflecting traditional international theory.' " *Id.* at 17a, quoting *Dames & Moore,* 453 U.S. at 679. By the same token, the court observed that when the foreign government reneges on a debt, the claimant's " 'only hope of obtaining any payment at all might lie in having his government negotiate a diplomatic settlement on his behalf.' " *Ibid.* quoting *Dames & Moore,* 453 U.S. at 679. In this case, for example, the court stressed that petitioner was unable to press its claim for more than 20 years after the

expropriation, and "[i]t was only the normalization of relations with the PRC" (of which the "settlement of outstanding claims against the PRC was a sine qua non") that "held out hope for [petitioner] to receive *any* satisfaction of its claim" (*id.* at 20a (emphasis in original)). Against this background, the court concluded that "[t]he President, in the exercise of his constitutional prerogative, struck the bargain he determined would best accommodate all relevant interests"; this action, in the court's view, was "a classical adjustment of 'the benefits and burdens of economic life to promote the common good,' " and not a taking. *Id.* at 21a, quoting *Penn Central,* 438 U.S. at 124.

The Claims Court noted as well that the President's settlement of petitioner's claim was "not a drastic and unexpected interference with its investment-backed expectations that offends traditional concepts of justice and fair play," because the President's power to espouse and settle claims "constitutes a well established aspect of international law" and thus formed part of the context in which petitioner invested in China in the first place (Pet. App. 22a). The court also found that the President's power to settle claims for less than their full value is analogous to the bankruptcy power, under which concededly valid debts may be discharged for less than their full amount in order to serve broader public purposes and to assure that individual creditors share ratably in the debtor's estate (*id.* at 22a-24a). Finally, the court was concerned that recognition of a cause of action under the Fifth Amendment in these circumstances would require the courts to second-guess the President's judgment as to what bargain was appropriate and feasible in the delicate diplomatic climate in which such negotiations often occur (*id.* at 24a-29a).

3. The court of appeals affirmed in a brief unpublished opinion (Pet. App. 1a-3a). The court assumed for purposes of its decision that petitioner's claim against the PRC

constituted "property" within the meaning of the Just Compensation Clause and that the claim was "worth" more than petitioner received as a result of the settlement negotiated by the President (*id.* at 2a). But, like the Claims Court, the court of appeals held that no taking without just compensation had occurred, because the President had "struck the bargain he determined would best accommodate all relevant interests" and "provided [petitioner] with some compensation for its claim, thus substituting a smaller certain sum for a larger contingent one" (*id.* at 2a, quoting *id.* at 21a).[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. The lump sum recovery under the Executive Agreement with the People's Republic of China was consistent with the amount recovered under other settlement agreements entered into since World War II. Moreover, the President has provided for the resolution of claims of United States nationals against foreign governments on numerous occasions since 1799 (see *Dames & Moore,* 453 U.S. at 679-680 & n.8), and no court has ever entered a judgment requiring the United States to pay compensation to a claimant who was dissatisfied with the President's

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[1]In a separate concurring opinion, Judge Miller concluded that recovery in the Claims Court was barred because petitioner's claim is one "growing out of" or "dependent upon" a treaty within the meaning of 28 U.S.C. 1502 (Pet. App. 3a). The majority did not reach the question of the applicability of this jurisdictional bar because it concluded that petitioner's cause of action is without merit in any event (*ibid.*). Because we agree with the courts below that petitioner has no cause of action under the Just Compensation Clause, we likewise do not address this jurisdictional issue. Compare *Great Western Ins. Co.* v. *United States,* 112 U.S. 193 (1884), and *Eastern Extension Telegraph Co.* v. *United States,* 231 U.S. 326, 333 (1913), with *Dames & Moore,* 453 U.S. at 688-690.

action. The rejection by the courts below of petitioner's efforts to obtain such compensation therefore does not warrant review by this Court.

1. Petitioner's argument in this Court proceeds as if the President had repudiated petitioner's claim against the PRC. Thus, petitioner repeatedly asserts that there has been a "bartering away," "sacrifice," "cancellation" or "extinguishment" of its claim and the "complete destruction" of its property interests. See Pet. 9, 10, 11, 14, 15, 17, 18. That is not what happened. The President did not repudiate the claims of petitioner and other United States nationals against the PRC. The President *espoused* those claims: he used the Chinese assets that had been frozen in the United States as bargaining leverage, he took advantage of the favorable climate of the unfolding normalization of relations with the PRC, and he secured a total of $80.5 million from the PRC in satisfaction of the claims of United States nationals. Petitioner has received approximately $20 million of that amount, almost 25% of the total, as compared with the value of $54 million the Foreign Claims Settlement Commission placed on petitioner's assets that were seized by the PRC in 1950. That was scarcely a "complete destruction" of petitioner's claim against the PRC. It was, rather, a bona fide and entirely fair settlement of petitioner's claim in the circumstances presented, and it was in line with other settlement agreements entered into by the President since World War II.[2]

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[2]See 1984 FCSC Ann. Rep. (Table of Completed Programs). Most settlements since World War II resulted in the payment of less than 38% of the principal amount certified by the Foreign Claims Settlement Commission. The settlement agreement with the PRC resulted in recovery of 41% of the principal amount of the certified awards. In contrast, the recovery from the Soviet Union amounted to 10% of the certified claims. *Ibid.* In only one of the ten post-World War II settlement agreements discussed in the report did the United States recover sufficient funds to pay 100% of the certified claims.

As petitioner conceded below, and as the Claims Court found (Pet. App. 19a-20a), petitioner had no realistic prospect of recovering *any* amount from the PRC in the absence of intervention by the President. See pages 14-17, *infra*. Now that the President has advocated petitioner's claim and secured a substantial payment of $20 million to be distributed to petitioner, "justice and fairness"[3] plainly do not require that petitioner be compensated in an additional amount out of the Treasury of the United States for an obligation that was owed by the People's Republic of China for the expropriation of property situated in China. In essence, petitioner, which voluntarily engaged in commercial activity in China subject to the possibility that its property might be expropriated, is asking the public to insure its total investment in a foreign country against any loss arising ou of confiscatory actions taken by the foreign government.

We note as well that when the legislation authorizing the Foreign Claims Settlement Commission to determine the value of property expropriated by the PRC was under consideration by Congress in 1966, an official of the American & Foreign Power Co., which owned a majority interest in petitioner Shanghai Power Co., testified in support of the legislation in the House hearings. See *Claims of Nationals of the United States Against the Chinese Communist Regime: Hearing on S. 3675 Before the Subcomm. on the Far East & the Pacific of the House Comm. on Foreign Relations,* 89th Cong., 2d Sess. 14-20 (1966). The official testified that it had "proved impossible for the company to secure any legal relief in the courts of China against the seizure and, in fact, the company was never even accorded a hearing by the Communist Chinese authorities," and he further stated that "[t]he Chinese Communist regime has totally disregarded the proper international standards and

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[3]See *Penn Central,* 438 U.S. at 124.

has shown no interest whatever in providing the victims of its property confiscation with any opportunity for the submission of proof of their claims." *Id.* at 15. The witness urged passage of the bill so that the value of confiscated properties could be ascertained while evidence on that question was still available, and he acknowledged that this information in turn was intended to give the State Department as accurate a picture as possible "for use at a time when a negotiated settlement of the claims against the foreign government becomes feasible." *Id.* at 16. Finally, the witness stressed that it was "very clear" that the bill "[did] not contemplate the appropriation of funds for the payment of claims" and that "the claims program will not cost the United States other than the usual administrative expenses for the work of the Foreign Claims Settlement Commission." *Ibid.*

Thus, petitioner's parent corporation acknowledged in 1966 that it had no redress against the PRC absent intervention by the United States government. Petitioner's parent corporation also surely was aware in 1966 that negotiated settlements by the Executive with foreign governments typically resulted in the recovery of far less than the full value of the expropriated property. Indeed, the most prominent of those settlements—the Litvinov Assignment of 1933 that settled the claims of United States nationals against the Soviet Union (see, *e.g.*, *United States* v. *Pink*, 315 U.S. 203 (1942))—had resulted in the payment of less than 10% of the claims.[4] Yet, far from objecting to a negotiated settlement by the Executive Branch, petitioner's parent corporation contemplated and sought to facilitate such a settlement by encouraging the enactment of a mechanism for the submission of claims against the PRC to the Commission. And it

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[4]See *Annual Report, supra* note 3, Index and Table of Completed Programs; Act of Aug. 9, 1955, ch. 645, 69 Stat. 562.

assured the Committee that the claims program, which petitioner subsequently invoked by submitting a claim to the Commission, would not impose any expense on the United States Treasury. This background highlights the absence of equity in petitioner's current claim to compensation from the United States because it is dissatisfied with the amount that it received pursuant to the settlement ultimately negotiated with the PRC.

2. There are, in any event, substantial analytical flaws in petitioner's argument.

a. First, petitioner concedes (Pet. 19) that the President has "unquestioned" authority to conclude a claims settlement agreement, such as that with the PRC. See also *Dames & Moore,* 453 U.S. at 675-688. This authority of the President stems in part from the obvious proposition—based both in practical reality and the theory of international law—that actions of a foreign government that injure an individual national of the United States also inflict an injury on the United States in its sovereign capacity. See, *e.g., Frelinghuysen* v. *Key,* 110 U.S. 63, 71-72 (1884). Compare *Heckman* v. *United States,* 224 U.S. 413, 437-442 (1912). The President's authority to settle the claims of the United States against a foreign government therefore necessarily subsumes the settlement of claims by United States nationals for any injuries they sustained.

The President does not actually represent individual claimants in a fiduciary capacity in the diplomatic settlement process. But whatever representation of the claimants' interests is afforded by the President as the "sole organ" of the Nation in the area of foreign affairs (*Dames & Moore,* 453 U.S. at 661, quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936)) is complete and does not depend on the acquiescence of the beneficiaries. See *Dames & Moore,* 453 U.S. at 679-680. Compare *Nevada* v. *United States,* 463 U.S. 110, 142 (1983), quoting

Heckman v. *United States,* 224 U.S. at 444-445. It is in the nature of the settlement process that the individual claimant must be bound by the agreement entered into by the President—at least in the absence of the most extreme circumstances, such as corruption or bad faith, of which there has been no suggestion here—just as a beneficiary in other settings is bound by the actions of a trustee or other person who is more directly charged by law with representing his interests. See *Nevada* v. *United States, supra.* This is so even though the President cannot act in the diplomatic process with exclusive regard for the interests of the individual claimant, because he also must protect the interests of the Nation as a whole. *Dames & Moore,* 453 U.S. at 680. Compare *Nevada* v. *United States,* 463 U.S. at 127-128, 142-143, 144 n.16. Cf. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 336-340 (1953); *Vaca* v. *Sipes,* 386 U.S. 171, 190-193 (1967).

This conceded and plenary authority of the President to settle claims on behalf of the Nation and individual claimants in a conclusive manner would be seriously undermined if a disgruntled claimant could collaterally attack the President's considered judgment simply by bringing an action in the courts of the United States to recover compensation for whatever additional amount the claimant believes the President should have obtained in the settlement. The result would be to require judicial second-guessing of the President's performance in diplomatic negotiations, without the benefit of the necessarily confidential information about the bargaining process, the positions of the debtor nation, and the myriad other considerations that might have informed the President's judgment.

Moreover, an individual's cause of action in such circumstances is one that essentially sounds not in taking, but in tort, based on allegations that the President failed to advance his interests adequately or fairly in the bargaining

process. Cf. *Ford Motor Co.* v. *Huffman, supra; Vaca* v. *Sipes, supra.* The President cannot be said to have "taken" the private claim in the sense in which the quoted term is commonly understood, because under international law—upon which petitioner relies for its contention that its claim against the PRC even amounts to a property right—the President had the authority from the outset to espouse and conclusively settle that very claim in his representational capacity on behalf of the United States, and thereby on behalf of the claimant as well. Allegedly inadequate advocacy of a claimant's interests in an overall bargaining process that looks to the normalization of relations is something quite different from the ordinary "taking" of a person's property.

b. There is another substantial analytical flaw in petitioner's argument. Petitioner contends that there was a taking to the extent that the President settled its claim against the PRC for less than its "full value" (Pet. i), by which petitioner means the amount certified by the Foreign Claims Settlement Commission (see Pet. 5), and it seeks to recover as compensation the difference between the two, a total of some $124 million. However, as the Claims Court pointed out (Pet. App. 11a-12a), the function of the Commission was to establish the value of petitioner's physical plant in China that was seized by the PRC. When the President entered into the Executive Agreement with the PRC in 1979, petitioner no longer owned the physical assets in China; instead, it owned a claim against the PRC for compensation for the PRC's expropriation of those assets (*id.* at 12a). It is that claim, not the physical assets themselves, that constitutes the property that allegedly was taken by the United States in this case.[5]

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[5]The value of the physical assets fixed by the Commission could not be dispositive even if the amount those assets were worth in 1950 were relevant to petitioner's just compensation claim against the United

The value of petitioner's claim against the PRC was, at most,

> the sum which, considering all the circumstances * * * probably could have been obtained for an assignment of the [claim for compensation] * * * that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy.

Brooks-Scanlon Corp. v. *United States,* 265 U.S. 106, 123-124 (1924). See also *United States* v. *50 Acres of Land,* No. 83-1170 (Dec. 4, 1984); *Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470, 473-478 (1973). Had petitioner attempted in 1979 to sell its claim against the PRC, which had been dormant for nearly 30 years, it would have received nothing close to the value the Commission placed on petitioner's physical assets in China in 1950.

There were numerous obstacles to recovery by petitioner against the PRC. Compare *Dames & Moore,* 453 U.S. at 687. By 1979, any such claim may well have been barred by the statute of limitations. And if petitioner had attempted to bring suit against China within the statute of limitations, jurisdiction presumably would have been dependent upon petitioner's ability to locate and attach unencumbered assets of the Chinese government in the United States. But both in 1950, when petitioner's "claim" arose, and subsequent to the enactment of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq.*, such assets were immune from prejudgment attachment. See, *e.g., Victory Transport, Inc.* v. *Comisaria General,* 336 F.2d 354 (2d

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States. The value arrived at by the Commission was not subjected to adversarial testing by the PRC or by the United States with a view toward the possible liability of either for the amount ultimately fixed by the Commission. Pet. App. 11a-12a.

Cir. 1964), cert. denied, 381 U.S. 934 (1965); cf. *Libra Bank Ltd.* v. *Banco Nacional de Costa Rica*, 676 F.2d 47, 49 (2d Cir. 1982).[6]

Moreover, even if petitioner had succeeded in establishing jurisdiction, the doctrine of sovereign immunity would have barred the suit. Prior to the enactment of the FSIA, foreign states enjoyed immunity from suit for their public acts, including the expropriation of private property for a public use. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983); *Rex* v. *Cia. Pervana de Vapores, S.A.*, 660 F.2d 61, 67-68 (3d Cir. 1981); *Victory Transport, Inc.* v. *Comisaria General*, 336 F.2d at 359-360.[7] A suit by petitioner against the PRC likewise would have been barred even after the enactment of the FSIA.[8] No doubt because it appreciated this obstacle, petitioner apparently never attempted to file such a suit. Compare *Dames & Moore*, *supra*.

Finally, even if petitioner had been able to obtain a judgment in its favor, that judgment would have been effectively unenforceable. Petitioner would have been unable to

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[6]The immunity from prejudgment attachment continued after the enactment of the FSIA because China did not make an explicit waiver of that immunity. See 28 U.S.C. 1609, 1610(d).

[7]The Executive also possessed authority to suggest immunity in appropriate cases, and the courts were bound by such suggestions. *Ex Parte Peru*, 318 U.S. 578, 588-589 (1943); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945).

[8]The FSIA recognizes a limited exception to the rule that foreign states are immune from claims based on the expropriation of property; that exception applies where the property is present in the United States in connection with a commercial activity conducted by the foreign state or the property is owned by an agency or instrumentality of the foreign state that is engaged in commercial activity in the United States. 28 U.S.C. 1605(a)(3). Petitioner could not satisfy the criteria for this exception because the property seized was not present in the United States or in the possession of a Chinese government instrumentality conducting a commercial activity in the United States.

execute against Chinese assets in the United States, absent waiver, because such assets were immune from seizure (Restatement (Second) of the Foreign Relations Law of the United States § 69, Reporter's Note 2 (1965)), and even after enactment of the Foreign Sovereign Immunities Act China's assets would have been immune from attachment for this purpose unless they were present in the United States in connection with a commercial activity. 28 U.S.C. 1610(a)(3). Moreover, all Chinese assets permanently in the United States had been frozen by the President. Those assets were subject to the President's plenary control (see *Dames & Moore,* 453 U.S. at 669-674), and he would have been under no obligation to make frozen assets available to petitioner to satisfy its judgment. See *Tran Qui Than* v. *Regan,* 658 F.2d 1296 (9th Cir. 1981), cert. denied, 459 U.S. 1069 (1982); *Sardino* v. *Federal Reserve Bank,* 361 F.2d 106 (2d Cir.), cert. denied, 385 U.S. 898 (1966); *Codray* v. *Brownell,* 207 F.2d 610 (D.C. Cir. 1953), cert. denied, 347 U.S. 903 (1954). In any event, there were insufficient assets of the Chinese Government in the United States to satisfy the full amount even of petitioner's claim alone, if that claim were measured by the value of $54 million the Foreign Claims Settlement Commission placed on petitioner's property, much less the full value of the claims of all United States nationals.[9]

In sum, if left to its own devices, petitioner faced virtually insuperable obstacles to recovering anything on its claim against the PRC. For this reason, the "value" of petitioner's private claim against the PRC, if measured by what a willing buyer would have paid for it prior to the President's settlement agreement with the PRC, was certainly far less

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[9]Of the approximately $80 million in blocked assets, only about $20 million were owned by the Chinese Government. The remainder belonged to various Chinese nationals.

than the $20 million petitioner ultimately recovered under that agreement—and may well have approached $0. Settlement of petitioner's claim for $20 million under such conditions cannot be regarded as a taking of property for which the Constitution requires the payment of compensation over and above that amount. Perhaps a prospective purchaser of the claim would have been willing to pay something in excess of the minimal or nonexistent value of the claim prior to the settlement with the PRC, based on speculation that the President might choose to espouse the claim and recover a more substantial amount. But petitioner had no *right* to have its claim espoused by the President; whether or not to do so was committed to the President's discretion. The value of the claim therefore should not be enhanced by the possibility prior to 1979 that the President might espouse it and obtain a substantial settlement. See, *e.g.*, *United States* v. *Fuller*, 409 U.S. 488, 491-494 (1973); *United States* v. *Rands*, 389 U.S. 121, 125 (1967).

It is true that the courts below assumed, without deciding, that petitioner's claim against the PRC was "worth" more than the amount it recovered under the settlement agreement. See Pet. App. 2a, 11a-12a. As we have explained, however, that assumption is utterly unrealistic, even though the courts below indulged in it for purposes of analysis. Because petitioner's ability to recover anything from the PRC was dependent almost entirely on a negotiated settlement, we cannot conceive on what basis a value in excess of the $20 million petitioner in fact realized as a result of the negotiated settlement could be assigned to the claim. In these circumstances, the substitution of one forum for another in pressing petitioner's claim—*i.e.*, the substitution of international negotiation, with the proceeds distributed on a pro rata basis through the Foreign Claims Settlement Commission, for whatever other forum petitioner in theory

might have had available—manifestly did not constitute a taking. Cf. *Dames & Moore,* 453 U.S. at 690 (Stevens, J., concurring in part).

c. Other factors bearing on the taking question also reinforce the conclusion that no taking of petitioner's property occurred as a result of the settlement with the PRC. As the Claims Court stated (Pet. App. 14a-15a (footnotes and citations omitted)):

> Factors relevant to whether there has been a taking are the degree to which the property owner's rights were impaired, the extent to which the property owner is an incidental beneficiary of the governmental action, the importance of the public interest to be served, whether the exercise of governmental power can be characterized as novel and unexpected or falling within traditional boundaries, and whether the action substituted any rights or remedies for those that it destroyed. In determining whether a taking has occurred the court must weigh all of the relevant factors and decide whether compensation is required by principles of justice and fair play.

Each of these factors weighs against finding a taking here.

In this case, petitioner received approximately 37% of the value of its property that was confiscated by the PRC in 1950. In other circumstances, this Court has sustained governmental action that resulted in a far greater diminution in the value of the property. See, *e.g., Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); Pet. App. 14a n.7. Moreover, in this case, petitioner was more than simply an "incidental" beneficiary of the overall normalization of relations, of which the claims settlement agreement was an

integral part. It realized the benefit of $20 million in payments, more than any other claimant received (Pet. App. 19a, 21a n.16).

The importance of the public interest served by the settlement agreement in this case also is manifest. The claim of an individual United States national against a foreign government is far different from the typical claim of one private person against another. As this Court has recognized, such claims not infrequently are "sources of friction" in the relations between two sovereign nations. *Dames & Moore,* 453 U.S. at 679, quoting *United States* v. *Pink,* 315 U.S. at 225. See Pet. App. 16a-18a. That friction, and the barrier to normalization of relations and commerce it causes, obviously affects the Nation as a whole and many of its citizens in addition to the particular claimant. This broader impact of one individual's claim on others and on the Nation's foreign relations substantially undermines the argument that a taking has occurred when the government has acted to eliminate that impact. See, *e.g., Goldblatt* v. *Hempstead,* 369 U.S. 590 (1962); *Miller* v. *Schoene,* 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian, supra.*

Finally, the exercise of governmental power in this case fell well within traditional boundaries; it was not novel and unexpected. As this Court explained in *Dames & Moore,* consistent with established international practice and traditional international theory, the President has exercised the power to settle claims of United States nationals against foreign governments on numerous occasions throughout the Nation's history. 453 U.S. at 679-680. The potential that the President might exercise that established authority in the event of an expropriation by the Government of China thus was part of the context in which petitioner invested in China. The President's eventual invocation of that authority therefore did not interfere with any reasonable or

distinct "investment-backed expectations" of petitioner. *Penn Central,* 438 U.S. at 124. See Pet. App. 18a-19a, 22a-24a.

For all of the foregoing reasons, as the Claims Court concluded, the settlement of the claims of petitioner and other United States nationals against the PRC as part of the normalization of relations was "a classical adjustment of 'the benefits and burdens of economic life to promote the common good' " (Pet. App. 21a, quoting *Penn Central,* 438 U.S. at 124). Justice and fairness do not require the payment of compensation to petitioner over and above the $20 million it already has received.

3. Contrary to petitioner's assertion (Pet. 9-15), there is no conflict between the decision below and the decisions of this Court or other courts of appeals. In *Dames & Moore,* upon which petitioner relies (Pet. 13-14), this Court simply held that the Court of Claims (now the Claims Court) has jurisdiction under the Tucker Act, 28 U.S.C. 1491, to entertain a suit alleging that a taking occurred as a result of the suspension of claims against Iran. The Court expressly did *not* decide the merits of the argument that the suspension of those claims constituted a taking. See 453 U.S. at 688.[10]

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[10]Petitioner also relies (Pet. 9-10) on *Ware* v. *Hylton,* 3 U.S. (3 Dall.) 199 (1796), in which the Court upheld the validity of a treaty that required debtors to pay their British creditors even though they believed that they had discharged their debts by paying the government of Virginia. Petitioner quotes a statement by Justice Chase, writing for himself, in which he stated that compensation "ought" to be paid to the debtors. *Id.* at 245. This statement was dictum and, although the Just Compensation Clause was cited, the statement is best understood as reflecting a moral rather than legal principle. The circumstances of *Ware* also differ substantially from those in the instant case. The debtors apparently were under a reasonable belief that they had discharged their debts in full by payment of a sum certain to the State. In this case, by contrast, petitioner had a claim *against* a foreign government; that claim had not previously been discharged for a sum certain, and indeed its value, if any, was highly speculative.

Petitioner relies principally on the Court of Claims' decision in *Gray* v. *United States,* 21 Ct. Cl. 340 (1886), which, under a special Act of Congress referring the matter for an advisory opinion, considered claims against the United States for the extinguishment of private claims against France in an 1800 treaty. However, *Gray* involved unique circumstances: the court in *Gray* opined that a taking had occurred because the American claims were valid and would have been honored by France, but were nevertheless released in full by the United States. See *Aris Gloves, Inc.* v. *United States,* 420 F.2d 1386, 1396-1397 (Ct. Cl. 1970) (Nichols, J., concurring). In this case, by contrast, there was no indication that the claims of petitioner and others would have been honored by the PRC absent the settlement. Moreover, the claims against the PRC were not renounced or released in full by the United States, as in *Gray*; the Executive espoused the claims and received a substantial recovery, which in turn was paid to the claimants. Thus, even assuming that *Gray* lends some precedential support to the notion that the United States must pay compensation in the unique circumstances there presented, it does not support petitioner's argument here.

In any event, as the Court of Claims itself later observed with regard to its own prior decision in *Gray,* it was "strictly an advisory opinion [for Congress] which was not binding upon either of the parties and cannot be binding upon subsequent courts" (*Aris Gloves,* 420 F.2d at 1393). And indeed this Court has said of the payments made by Congress as a result of *Gray* that the "payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payment as of grace and not of right." *Blagge* v. *Balch,* 162 U.S. 439, 457 (1896). Accord, *United States* v. *The Schooner Peggy,* 5 U.S. (1 Cranch)

103, 110 (1801) ("it is not for the court, but for the government, to consider whether it be a case proper for compensation").[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]Similarly, two court of appeals decisions that cite *Gray* merely state in dicta that there may be situations in which the President's "cancellation" or "extinction" of private claims in a settlement might constitute a taking. See *American International Group,. Inc.* v. *Islamic Republic of Iran,* 657 F.2d 430, 446-447 (D.C. Cir. 1981); *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority,* 651 F.2d 800, 813 n.20, 814-815 (1st Cir. 1981). Those dicta do not describe the circumstances of this case, and in each instance, the court held that the taking claim was premature. In *Marschalk Co.* v. *Iran National Airlines Corp.,* 518 F. Supp. 69, 93 (S.D. N.Y. 1981), rev'd and remanded, 657 F.2d 3 (2d Cir. 1981), which also cites *Gray,* the district court did state that the settlement with Iran would require the payment of compensation. However, as the Second Circuit subsequently made clear, this aspect of the decision did not survive the decision in *Dames & Moore.* See 657 F.2d at 4. In *Meade* v. *United States,* 2 Ct. Cl. 224 (1866), aff'd, 76 U.S. (9 Wall.) 691 (1870), this Court expressly did not concur in the Court of Claims' finding that the United States was liable for a taking, concluding that the claim was barred because it had been dismissed by the treaty commissioner. See 76 U.S. (9 Wall.) at 700-701, 725. And in *E-Systems, Inc.* v. *United States,* 2 Cl. Ct. 271 (1983), the taking claim was found to be premature.